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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 934

ROY MICHAEL FELTON, RALPH FRANKLIN MOORE, JAMES HOLLINGSHEAD, JOSEPH W. SPIRAKIS and RALPH JAMES ARMANTROUT,

Petitioners,

vs.

THE CITY OF PENSACOLA,

Respondent.

Brief opposing granting of
Writ of Certiorari

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THE CITY OF PENSACOLA,

Respondent.

On Petition For a Writ of Certiorari to the District Court of Appeal, First District State of Florida

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Brief For the City of Pensacola in Opposition

STATEMENT OF THE CASE

Though Petitioners' Statement of the Case is basically accurate, Respondent deems that certain matter was omitted therefrom.

Respondent is at some disadvantage relative to this matter and in others where a reference to the record is necessary or desirable because of the fact that neither the record nor the exhibits are readily available to Respondent. Of necessity Respondent must refer directly to the transcript of the trial of the proceedings. In the trial court no motion was ever made that the warrants be quashed or that the evidence be suppressed. As a matter of fact the Petitioners' attorney in the trial court, not once but twice, stipulated that the magazines in question not only be admitted but that they would be used in conjunction with the individual cases whereby they were stipulated as admitted. (RT. 3 and RT. 15).

Another omission is the testimony of a police officer to the effect that some of the magazines were in a showcase, were in close proximity to other periodicals and that he witnessed the sale of a nudist year book to one other man other than a police officer. (RT. 6, RT. 6 and RT. 9)

In addition a city witness testified that in his opinion the magazines were obscene. (RT. 6)

The trial court also stated:

"Each case stands on its own merits and each picture stands on its own pose. It is obvious to a person or a man, I think, of ordinary common sense, that is trying to be law-abiding, that these magazines are not put out primarily for nudists in this area. They are put out, I believe, to appeal to the baser instincts in the human

race and I believe that is where they enjoy their greatest sale," and, "I noticed on these magazines that they run from $2.50 up or down, which would show that they are rather high. Many people would have to sacrifice to buy them." (RT. 25 and RT. 26)

ARGUMENT

1. Respondent takes the position that the magazines involved here are not only obscene and thus unlawful under the Pensacola Ordinance but also meet the required constitutional tests for obscenity.

The prosecution not only attempted to but did prove that these magazines substantially exceed contemporary standards in the depiction or representation of sex and nudity, appeal to a prurient interest and are utterly without social importance.

Petitioners allege that these magazines are comparable in their description of sex and nudity to other magazines which have been found not to exceed the limits of candor in the nation as a whole or which have social importance justifying their protection.

Petitioners go on to enumerate various issues of many magazines which have been given constitutional protection.

In the instant case the officers visited the various newsstands and saw the magazines not only openly displayed and stapled but in close proximity to other periodicals.

The open display of the magazines together with their stapling certainly indicates knowledge of their contents on the part of the Petitioners.

Their display in close proximity to other periodicals certainly made it impossible for visi-

tors to the newsstands to avoid exposure to the magazines complained of.

Petitioners complain of the lack of any evidence of pandering. An examination of the magazines reveals that they consist of nude pictures with some small amount of written matter of no interest or importance. It is obvious from their contents, their price and their stapling that they are sold to gratify the prurient interest of the purchaser. This the Petitioners well know.

Petitioners complain of the lack of evidence and of proof.

The magazines themselves are the evidence. They were lawfully admitted into evidence and examined by the trial court.

Insofar as concerns proof, the trial judge, as the trier of the facts, had the duty of ascertaining the status of these magazines. After his examination of said magazines he determined them to be obscene under the ordinance, in our contemporary society and under the constitution.

These magazines are not entitled to the use of the Constitution of the United States as a cloak.

2. Petitioners complain that the Pensacola Ordinance does not require scienter and in addition that none was shown. They appear to rely largely on Smith vs. California, 361 U.S. 146, 4L. Ed. 2d 205,,80 S. Ct. 2 15. The case is not in point.

In the Smith case there was timely objection to the lack of scienter, the Court took the position that none was necessary and it was not proved.

In the instant case we are applying the Florida Law which implies the necessity of scienter. Cohen vs. State, 125 So 2d 560. In addition Petitioners waived scienter by their failure to

make timely objection. Chapter 909.01, 909.02 and 909.06, Florida Statutes, 1965.

Notwithstanding Petitioners' waiver scienter was shown.

These magazines are not books in the sense that they are intended to be read. They are nudist magazines. A glance at their covers reveals their contents. In addition they were openly displayed, stapled and being sold for a high price.

These magazines do not descend upon the owners of the various newsstands like manna from Heaven. They must be ordered, unpacked, put on display, sold and paid for.

Respondent cannot believe that it can seriously be argued that Petitioners were unaware of the nature and contents of the magazines in question.

Petitioners complain too late of the alleged illegal seizure of the magazines if in fact the seizure was illegal.

The majority of cases examined on the question of seizure deal with written matter and with search warrants.

Here we are dealing with pictures on display in full view of the public. A police officer would be justified in arresting without a warrant, nonetheless warrants of arrest were secured.

At the trial there was no motion to suppress. On the contrary the Attorney for Petitioners not once but twice stipulated that the magazines be admitted into evidence and used in the various cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

The pertinent provisions of Florida Statutes, 1965, Chapter 909 are:

909.01 Time to move to quash or plead. -- Either prior to or upon being arraigned, the defendant shall, unless the court grants him further time, either move to quash the indictment or information or plead thereto, or do both. If he moves to quash, without also pleading, and the motion is withdrawn or overruled, he shall immediately plead.

909.02 Certain pleas abolished; motion to quash substituted. -- Pleas to an indictment or information, other than pleas of nolo contendere, guilty, or not guilty, are abolished.

All defenses heretofore available to a defendant by plea, other than pleas of nolo contendere and not guilty, shall be taken only by motion to quash the indictment or information, whether the same relate to matters of form or substance, former acquittal, former jeopardy, or any other defense which heretofore was raised by plea.

909.06 Effect of failure to move to quash; exceptions. -- If the defendant does not move to quash the indictment or information before or at the time he pleads thereto he shall be taken to have waived all objections which are grounds for a motion to quash. If, however, the defendant learns after he has pleaded or has moved to quash on some other ground that the offense with which he is not charged is an offense for which he has been pardoned, or of which he has been convicted or acquitted or been in jeopardy or for

which he has been granted immunity the court may in its discretion entertain at any time before verdict a motion to quash or motion for directed verdict on the ground of such pardon, conviction, acquittal, jeopardy or immunity.